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No. 95-171

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

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THEODORE S. PAPAILA,
*Petitioner,*

v.

UNIDEN AMERICA CORPORATION,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF IN OPPOSITION

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RICHARD M. KOBDISH *
REBECCA A. SINGER
R. S. GHIO
FULBRIGHT & JAWORSKI L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
(214) 855-8000
*Counsel for Respondent*
* Counsel of Record

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## QUESTIONS PRESENTED

1. May Respondent, an American subsidiary of a Japanese corporation, invoke the rights of its Japanese parent corporation under the 1953 Treaty of Friendship, Commerce and Navigation between the United State and Japan ("FCN Treaty") with respect to the parent corporation's placement of, and personnel decisions regarding, Japanese nationals ("expatriates") sent to the subsidiary to manage the parents' assets invested in the United States?

2. Notwithstanding the FCN Treaty, may a United States citizen who is an employee of such a subsidiary assert an action under Title VII of the Civil Rights Act of 1964 alleging discriminatory conduct in the placement and treatment of Japanese expatriates sent to the United States by the Japanese parent corporation to manage its investments in this country?

3. Is there any conflict among the Circuit Courts of Appeals with respect to the Fifth Circuit's decision below that the FCN Treaty acts as a limited bar to certain actions under Title VII?

4. Is the decision of the Fifth Circuit below consistent with this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982)?

## PARTIES TO THE PROCEEDINGS

Respondent, Uniden America Corporation (a wholly-owned subsidiary of Uniden Corporation), and Petitioner, Theodore S. Papaila ("Papaila").

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## BRIEF IN OPPOSITION

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### CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS

Article VII(1) of the Treaty of Friendship, Commerce, and Navigation between the United States and Japan, April 2, 1953 (hereinafter "FCN Treaty" or "the Treaty"), provides, in relevant part:

> Nationals and companies of either Party . . . shall be permitted within [the] territories [of the other Party]: (a) to establish and maintain branches, agencies, offices, factories, and other establishments appropriate to their conduct of business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired.

4 U.S.T. 2063, art. VII(1).

Article VIII(1) of the FCN Treaty further provides in relevant part:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice.*

4 U.S.T. 2063, art. VIII(1) (emphasis added).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, provides that it is unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

## STATEMENT OF THE CASE

### A. The Business of Uniden America

Uniden America is incorporated in the State of Indiana, and has its offices and principal place of business located in Tarrant County, Texas. Uniden Corporation ("Uniden Japan"), the parent of Uniden America, has its headquarters in Tokyo, Japan. Uniden Japan is engaged in the business of designing, manufacturing and selling a variety of electronic equipment including radio communication devices ("C.B." transceivers, etc.), radio applications (*i.e.*, pagers, radar detectors, two-way radios, and

scanners), telephone equipment (cordless, mobile, cellular and portable telephones), and satellite broadcast receiving equipment. Uniden Japan's primary manufacturing facilities are located at subsidiaries in the Philippines and in China. Uniden Japan has approximately 9,000 employees world-wide and, in addition to Uniden America, has many other subsidiaries located in various countries throughout the world. Vol. II at 298-99; Vol. IV at 782.[1]

**B. Uniden America's Workforce**

As found by the District Court, and undisputed by Papaila:

> Uniden [America] has approximately 400 employees of which sixteen are on temporary work assignments sent to Uniden [America] by Uniden Japan. Such [temporary] employees are all Japanese citizens who have been sent by Uniden Japan in order to protect its interests in its subsidiary. The parties refer to such Japanese citizens as Japanese expatriates. Uniden [America] does not dispute that such employees were treated differently than American employees, and the only basis for Papaila's claims of race and national origin discrimination is the preferential treatment given to Japanese expatriates. The Japanese expatriates were sent to Uniden [America] on temporary work assignments by Uniden Japan. The remainder of Uniden [America's] employees, including six of Japanese origin, were under the direct control of Uniden [America]. The six Uniden [America] employees of Japanese origin were treated exactly the same as all of Uniden [America's] employees and [they] do not receive the same treatment as the Japanese expatriates.

Vol. IV at 783-84. Thus, less than five percent of the employees working at Uniden America's Texas headquarters are Japanese expatriates, whom Papaila alleges re-

[1] Citations to the original record on appeal shall first refer to the volume, and then to the page or pages in that volume.

ceived preferential treatment on the basis of race and national origin. Stated differently, almost ninety-six percent (96%) of Uniden America's workforce consists of persons, *including* six employees of Japanese "race" and national origin, who were treated no more favorably than Papaila in connection with the issues raised by the Petition for Writ of Certiorari ("Petition").

**C. The Japanese Expatriates**

Papaila previously has admitted that the Japanese expatriates whom he alleges enjoyed more favorable treatment all occupy (or occupied) managerial positions, all were hired in Japan by Uniden Japan, and all were assigned by the parent to Uniden America. Papaila's Brief to the Fifth Circuit ("Papaila's Brief") at 5. Moreover, prior to the beginning of their temporary overseas assignments, all Japanese expatriates received extensive business training from the parent company. The mission of these Japanese expatriates, regardless of the Uniden Japan subsidiary or the country to which they are assigned, is to manage Uniden Japan's shareholder interests and to provide skills essential to the business of the subsidiary. Vol. II at 298-301. Papaila repeatedly has admitted that all of the personnel actions or policies which he alleges discriminated in favor of the Japanese expatriates, and against him as well as all other employees of Uniden America who were not Japanese expatriates, were established or committed by the parent company, Uniden Japan, and *not* by Uniden America.[2]

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[2] Several times in his Petition, Papaila vacillates from alleging that Uniden America discriminated in favor of its "Japanese employees," to stating that the "Japanese expatriates" were the beneficiaries of favored treatment. *Compare, e.g.*, Petition at 3, 19 with 5, 18. Of course, there is a highly significant difference between these two groups. Papaila's persistent inconsistency is inexplicable, because at no time in this proceeding has he alleged that the six Uniden America employees who are of Japanese race and national origin, but who are not expatriates, were treated better than he. Clearly, then, the list of persons Papaila contends were the victims

The salaries of Uniden America's Japanese expatriates are carried on a separate Uniden America payroll account. Uniden Japan makes all personnel-related decisions involving Japanese expatriates. Furthermore, Uniden Japan hires, fires, transfers, promotes, and discharges the Japanese expatriates assigned to Uniden America. Such assignments are temporary, typically from four to five years, at the end of which the Japanese expatriate is brought back to the parent in Japan or assigned to another foreign subsidiary. Uniden Japan alone evaluates the performance of the Japanese expatriates. It also unilaterally sets their salary and benefit structure (which is different from the salary and benefit structure of other Uniden America employees), and maintains their personnel files. Vol. II at 300-01; Vol. III at 708-09, 714, 716, 718, 720, 723-24.

**D. Uniden America's Other Employees**

In contrast to the Japanese expatriates, all other Uniden America employees are under the direction and control of Uniden America, and their wages, benefits, etc. are set by Uniden America management. Significantly, this *includes* six employees of Uniden America who, although of Japanese "race" and national origin, were hired by Uniden America in the United States, just like all other U.S. employees. As stated above, these six people of Japanese "race" and national origin are treated *exactly* the same as all of Uniden America's *non*-Japanese citizen employees. Vol. II at 300, 302; Vol. III at 716, 720.[3]

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of race and national origin "discrimination" includes the six Uniden America employees of Japanese "race" and national origin, who happen not to be expatriates. Papaila's Brief at 4-6; Vol. III at 677-78; *see also* Vol. II at 302-03.

[3] Papaila incorrectly asserts that Uniden America has "at no time below . . . raise[d] citizenship as the distinction in the treatment of its expatriate employees." Petition at 6. Papaila made

**E. Proceedings Below**

Papaila's characterization of the decisions of the courts below is imaginative, but inaccurate. On May 19, 1993, Papaila filed this lawsuit in the Northern District of Texas, alleging various types of discrimination including, *inter alia*, the Title VII claims he continues to pursue herein. On December 3, 1993, Uniden America moved for partial summary judgment, and on January 10, 1994, the District Court granted said motion.

Contrary to the representations made by Papaila, the District Court did *not* hold that Uniden America was "entitled to assert all treaty rights of its parent corporation." Petition at 3. Rather, the District Court concluded, consistent with the decision in *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991), only that:

> [A] judgment forbidding the American subsidiary from giving preferential treatment to the expatriate executives sent by its parent to work for the subsidiary would have the same effect on the parent as it would have if it ran directly against the parent—it would prevent the parent from sending its own executives to manage its American business in preference to employing United States citizens.

*Papaila*, 840 F. Supp. at 446. The question of whether the subsidiary was entitled to assert *all* of the treaty

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this same argument to the Fifth Circuit, and Uniden America pointed out there, as here, that the assertion was "absolutely incredible." As explained to the Fifth Circuit, Uniden America raised the issue of citizenship *three* times in its Motion for Summary Judgment, *six* times in its Brief in Support thereof, *twice* in the Pretrial Order, and at least once in the hearing on Uniden America's Motion for Summary Judgment. Uniden America's Brief to the Fifth Circuit ("Uniden's Brief") at 6 n.7. Thus, Uniden has raised the citizenship distinction as a central issue both before the District Court as well as the Fifth Circuit, as evidenced by the fact that both courts discussed citizenship in reaching their decisions. *Papaila v. Uniden America Corp.*, 51 F.3d 54, 56 n.2 (5th Cir. 1995); *Papaila v. Uniden America Corp.*, 840 F. Supp. 440, 447 (N.D. Tex. 1994).

rights was not before the District Court; rather, the only issue was whether the treaty provisions would protect the subsidiary from Title VII liability where decisions, such as the placement and treatment of key managerial personnel, are dictated by the parent company.

As discussed more fully herein, the Fifth Circuit decision also is much narrower than suggested by Papaila. The Fifth Circuit expressly limited its holding to the specific facts before it:

> Since UAC [Uniden America] did not itself cause any of the discriminatory conduct, we hold that UAC may invoke its parent's Treaty rights, at least *with respect to those employment decisions dictated by the parent.*

*Papaila*, 51 F.3d at 56 (emphasis added). Thus, both courts below held only that Uniden America could assert the treaty rights of its Japanese parent with respect to personnel decisions dictated by the parent which involve its expatriate personnel. As a result, Papaila's foreboding statements regarding the breadth of the Fifth Circuit decision are unfounded.

## SUMMARY OF REASONS FOR DENYING THE WRIT

In order to construct an argument that the decision of the Fifth Circuit merits review by this Court, which it does not, Papaila makes two fundamental errors. First, he entirely mischaracterizes the nature and scope of the decision of the court below. Second, based upon this unduly expansive reading of the decision of the court below, Papaila creates out of whole cloth a supposed "conflict" among the Circuit Courts of Appeals where none in fact exists. When the decisions of the Fifth Circuit and the other Circuit Courts are read in accordance with their plain language, it becomes abundantly clear that a writ of *certiorari* is unnecessary.

Papaila, "a white United States citizen of American national origin" (Vol. IV at 782), essentially asserts in this

case that he was the victim of "reverse" race and national origin discrimination. That is, Papaila claims that had he been a Japanese expatriate, he would not have been fired for failing to "make" his sales quota,[4] but instead would have been given a demotion or transfer, as Japanese expatriates allegedly were. *See* Papaila's Brief at 5-6. Uniden America contends, and the Fifth Circuit agreed, that the District Court was correct in granting summary judgment on these issues because the "discrimination" of which Papaila complains, even if true, expressly is *allowed* by the FCN Treaty between the United States and Japan, which confers narrow Title VII immunity for *this* type of discrimination. Indeed, as demonstrated *infra*, where the individuals allegedly receiving preferential treatment are "accountants and other technical experts, executive personnel, attorneys, agents and other specialists" (4 U.S.T. 2063, art. VIII(1)), are citizens of the country in which the foreign parent is headquartered, and are sent to the United States on a temporary expatriate basis, a non-expatriate employee of the United States subsidiary (like Papaila) cannot point to those expatriates as "comparitors" for purposes of race and national origin discrimination.

The Fifth Circuit decision upholding Uniden America's arguments is correct and need not be reviewed by this Court. First, the decision below is much narrower than is suggested by Papaila. Rather than granting Uniden America complete immunity in all respects from Title VII, the Fifth Circuit held only that insofar as Uniden America's employment actions relating to executives and other key expatriate personnel are *directed* by the parent corporation, such decisions are protected under the provisions of the FCN Treaty and therefore do not violate Title VII. With respect to all other employment decisions relating to non-expatriate employees, Uniden America

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[4] At the time of his termination, Papaila was in a sales position, after having been demoted from the position of Vice President. Petition at 4.

still is bound by the employment laws of the United States, including Title VII.

As a result, Papaila's argument regarding a "conflict" among the Circuit Courts of Appeals fails. Papaila apparently attempts to create a conflict by pointing to the Second Circuit's ruling in *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2nd Cir. 1981) *rev'd and remanded*, 457 U.S. 176 (1982), that the FCN Treaty does not grant American subsidiaries of Japanese corporations *complete* immunity from Title VII. However, such a ruling neither has been sought by Uniden America nor granted by the Fifth Circuit. Furthermore, the Second Circuit's decision does not conflict with that of the Fifth Circuit regarding the assertion of treaty rights by a subsidiary. Because the Fifth Circuit and Second Circuit decisions are not in conflict, a writ of *certiorari* would be inappropriate.

## REASONS FOR DENYING THE WRIT

### I. THE TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION GRANTS JAPANESE CORPORATIONS THE RIGHT TO ASSIGN KEY PERSONNEL OF THEIR CHOICE TO THEIR U.S. OPERATIONS

Under the FCN Treaty between the United States and Japan, companies of each country have the right to form and oversee their investments made within the territory of the treaty partner, either directly through branch offices or indirectly under the general corporate laws of the other party. 4 U.S.T. 2063, art. VII(1). Pursuant to this provision, Uniden Japan formed Uniden America. To ensure that companies of each party to the FCN Treaty are able to protect their investments in the territory of the other party, the FCN Treaty further provides that companies of each party have the right to assign certain key personnel to their operations in the host country. Thus, Article VIII(1) of the FCN Treaty provides in relevant part:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*.

4. U.S.T. 2063, art. VIII(1) (emphasis added).

Consequently, the FCN Treaty allows a company headquartered in the territory of one party to favor its own citizens in filling management positions within the host country, without running afoul of local laws such as Title VII's prohibition against national origin and race discrimination. As the Sixth Circuit found with respect to a similar treaty between the United States and Greece:

> [C]ompanies of either party are permitted to discriminate in favor of their own nationals or citizens for certain high level positions, but not to discriminate against others in the labor force of the host country on any other basis. The words "of their choice" merely reflect the intent of both the United States and Greece to give the other's companies the freedom to fill designated critical positions *without* interference of local laws and regulations.

*Wickes v. Olympic Airways*, 745 F.2d 363, 367 (6th Cir. 1984) (emphasis added).[5] Thus, the holding in *Wickes*,[6] like that of every other Circuit Court of Appeals

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[5] This reciprocal treaty provision which allows the placement of a treaty country's citizens in executive positions appears in a number of FCN treaties between the United States and foreign countries. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 181 n.6, 102 S.Ct. 2374, 2377 n.6 (1982). As this Court expressly has recognized, the reciprocal provision in the Treaty between the United States and Japan was included at the insistence of the United States, which sought to protect its interests in making certain that American companies could assign American citizens to executive positions in their overseas operations without violating foreign laws. *Id.*

[6] Although in *Wickes* the employer charged with discrimination was a Greek corporation, not a subsidiary organized and existing

which has addressed the issue of the *scope* of protection granted by the Treaty, fully supports the decision of the Fifth Circuit.[7]

Importantly, Papaila cites *no authority* to the contrary. Instead, he ignores all of the case law on this issue and cites law review articles four decades old for the general proposition that the FCN Treaty was not intended to act as an exception to Title VII. Significantly, however, the federal courts consistently have recognized that the Treaty *does* create such an exception. What Papaila requests of this Court is that it reverse decades of Circuit Court precedent and radically re-interpret the scope of the Treaty. This is an invitation the Court should decline.

## II. THE SUPREME COURT'S DECISION IN *SUMITOMO SHOJI* LEFT OPEN THE QUESTION OF WHETHER A SUBSIDIARY OF A FOREIGN CORPORATION MAY ASSERT CERTAIN TREATY RIGHTS OF ITS PARENT

In *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 102 S. Ct. 2374 (1982), the U.S. Supreme Court held that, since Sumitomo was incorporated under the laws of the United States, it was not a "company of Japan," and therefore *it* did not have treaty rights under article VIII(1) of the FCN Treaty. 457 U.S. at 189.

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under the laws of the United States, the case does demonstrate (as do other cases cited *infra*) that when an FCN treaty applies to a case alleging violation of United States employment discrimination laws, the treaty does create some degree of immunity under Title VII with respect to a very narrow category of employees (*i.e.*, foreign citizen expatriates in job classifications covered by the treaty).

[7] Papaila argues in his Petition that while it legally is permissible for an expatriate from a foreign country to be *assigned* a position in the United States in preference to U.S. nationals (which, without treaty protection, would be a *per se* violation of Title VII), once here, the expatriate thereafter can in no way receive "favored" treatment. As is demonstrated below, such a distinction cannot withstand scrutiny, either legally or practically.

However, since the Court confined its review to the narrow question of whether the American subsidiary could assert treaty rights on its own behalf as a "company of Japan," the Supreme Court added the following caveat:

> We also express no view as whether Sumitomo may assert any article VIII(1) rights of its parent.

457 U.S. at 189 n.19, 102 S. Ct. at 2382 n.19.

Thus, since Uniden America is incorporated under the laws of Indiana, it cannot *itself* claim a right under the FCN Treaty to assign Japanese citizens to executive and managerial positions at Uniden America. Here, however, unlike in *Sumitomo Shoji*, Uniden America seeks to assert the treaty rights of its *parent* with respect to the *parent's* decisions to assign expatriates to Uniden America, and to maintain them there, on the basis of their Japanese citizenship.

Interestingly, Papaila argues in his Petition that the Fifth Circuit decision below is in conflict with this Court's decision in *Sumitomo Shoji*, because it would grant U.S. subsidiaries "absolute standing" under the FCN Treaty. Petition at 8. As shall be demonstrated herein, Papaila is incorrect. The Fifth Circuit did *not* rule, and Uniden America never has contended, that Uniden America could assert *all* of the treaty rights of its Japanese parent. Rather, the court below simply ruled that a U.S. subsidiary "may assert the Treaty rights of the parent, 'at least *to the extent necessary to prevent the treaty from being set at naught.*'" *Papaila*, 51 F.3d at 55 (emphasis added) (quoting *Fortino*, 940 F.2d at 393). The court further held that in order to fulfill the purpose of the Treaty, a subsidiary should be able to invoke its parent's rights "with respect to those employment decisions dictated by the parent." *Id.* at 56. The court below went *no further*.

Thus, with respect to the sixteen expatriate employees whose assignment and terms of employment are

dictated by the parent corporation, Uniden America may assert the treaty rights of Uniden Japan. However, with respect to the balance (96%) of Uniden America's workforce, the U.S. subsidiary must fully comply with U.S. and local laws, including Title VII. This is a fundamentally different result from that proscribed by the Supreme Court in *Sumitomo Shoji*, and thus there is no conflict between the two decisions.

## III. UNIDEN AMERICA MAY ASSERT CERTAIN TREATY RIGHTS OF ITS JAPANESE PARENT

As stated above, the facts in this case show, and Papaila concedes, that *none* of the conduct or policies which allegedly discriminate on the basis of race or national origin were the creation of Uniden America. Rather, *all* were dictated by the parent company, Uniden Japan. Uniden America had no say whatsoever in these policies or personnel decisions. Furthermore, it is undisputed that each of the Japanese expatriates sent to Uniden America by the parent were Japanese citizens and were "accountants and other technical experts, executive personnel, attorneys, agents and other specialists." Uniden Japan, whose standing under the FCN Treaty is unchallenged, chose to send these individuals to the United States in order to oversee and protect its investment assets. Papaila contends that these individuals were given preferential treatment, as compared to him.

These contentions and undisputed facts bring into sharp focus the issue that was *not* reached in *Sumitomo Shoji*, *i.e.*, whether a United States subsidiary which is not a "company of Japan," can assert certain treaty rights of a parent which *is* such a company. Uniden America contends that since *it* was not the agent of causation for any of the alleged discriminatory events or policies, Uniden America *must* be able to invoke the FCN Treaty rights of its parent—at least with respect to those employment-related matters over which *Uniden America*

had no control—or else the FCN Treaty would have no meaning in the modern business world.

### A. The Fifth Circuit's Decision Is Limited to Personnel Decisions Dictated by the Parent Corporation

In a fundamental misstatement of the holding of the court below, Papaila argues in his Petition that Uniden America "does not have standing to assert [the FCN Treaty] as an *absolute* bar to Title VII." Petition at 8 (emphasis added).[8] However, this was not the decision of the Fifth Circuit, which expressly *limited* its holding to personnel decisions mandated by the parent corporation regarding expatriate employees. This *limited* holding is ignored by Papaila, who instead attacks his own rhetoric.

### B. Uniden America Has Standing to Assert Its Parent's Treaty Rights Because the Rights of the Parent Corporation Otherwise Will Be Impaired

Papaila argues in his Petition that Uniden America lacks standing to assert the rights of its parent because: (a) a litigant should not be allowed "to base a claim or a defense on the rights of a person not before the Court;" and (b) "there has been no impairment of rights" of Uniden Japan. Petition at 9. Neither of these arguments is correct.

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[8] Papaila makes similarly broad and inaccurate statements throughout his Petition regarding the holding of the court below. Papaila mistakenly accuses the Fifth Circuit of holding that Uniden America: "is entitled to assert *all* treaty rights of its parent corporation;" can assert the FCN Treaty as "an *absolute bar* to the laws of the United States;" has "*absolute standing* . . . to assert *all* of the rights of [Uniden Japan];" and may "*wholly ignore* American statutes, including Title VII." Petition at 3, 7, 8, 16 (emphasis added). At one point Papaila even argues that the Fifth Circuit "endorsed a right to *assign treaty rights* of a Japanese parent company to its wholly owned subsidiary" and that Uniden Japan should not be given an "unfettered right to order an American corporation to violate American laws." *Id.* at 10, 22 (emphasis added). Unfortunately for Papaila, there is nothing in the Fifth Circuit's decision to support his hyperbole.

First, Papaila's argument ignores *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364 (1991), which set out three factors a litigant must meet in order to assert the rights of third persons, each of which is met in this case: (1) the litigant must face an "injury-in-fact" giving it a "sufficiently concrete interest" in the issue (here, an adverse verdict would subject Uniden America to the payment of damages for the disputed policies or decisions of its parent); (2) the party must have a close relationship to the third person (Uniden America is a subsidiary of Uniden Japan); and (3) some hindrance must exist to the third party's ability to protect its own interests (Uniden America, not Uniden Japan, carries out the business functions at the Tarrant County, Texas headquarters). *Id.* at 410-11, 111 S.Ct. at 1370-71. As the Seventh Circuit held in *Fortino*, where, as here, the parent dictates the alleged discriminatory conduct, the subsidiary *must* be allowed to assert the FCN Treaty rights of the parent. Otherwise, the FCN Treaty would be "set at naught." 950 F.2d at 393.

Second, there undoubtedly would be an impairment of the rights of Uniden Japan if the Fifth Circuit's decision were reversed. Each of the decisions challenged by Papaila herein was made by *Uniden Japan* for the purpose of managing expatriate employees sent to the United States to oversee its investments. Papaila urges a reading of Title VII and the FCN Treaty which would tie the hands of Uniden Japan with respect to personnel decisions regarding the executives, etc. *of its choice* whom it desires to send to this country. Clearly, the impairment of Uniden Japan's treaty rights imposed by such a result would be no less onerous than an adverse holding against Uniden Japan itself.

The only argument put forward by Papaila to the contrary is that Uniden Japan, "*when [itself] involved in litigation*, [is] perfectly capable of enforcing [its] own statutory treaty rights." Petition at 10 (emphasis added).

This adds nothing to the Court's inquiry. As is obvious by the caption of this case, Uniden Japan is *not*, itself, "involved" in this litigation, although it certainly has an interest in the outcome. What Papaila suggests is that a Japanese company can be stripped of its rights under the FCN Treaty, just so long as a plaintiff sues its subsidiary. Such a result is antithetical to the FCN Treaty and should be rejected. Where employment decisions are dictated by an entity that is protected under the Treaty, such protection should not dissolve merely because the entity acts through its U.S. subsidiary.

### 1. *The Fifth Circuit's Decision That Uniden America May Assert the Treaty Rights of Its Japanese Parent Is Consistent With the Relevant Case Law*

Papaila attempts to discredit the substance of the Fifth Circuit's decision by arguing that other case law forecloses the Fifth Circuit's holding. However, the decision below is consistent with the reasoning of other circuits, and the District Court cases cited by Papaila do not dictate the result he advocates.

#### a. *The Fifth Circuit's Decision Closely Adheres to the Seventh Circuit's Decision in* Fortino

Although Papaila previously has attempted to discredit the recent Seventh Circuit Court of Appeals' decision in *Fortino,* his Petition hardly mentions the decision at all, and never critiques its analysis in any depth. This reticence is surprising because the Seventh Circuit clearly *rejected* all of Papaila's arguments and embraced those of Uniden America. Thus, in *Fortino,* as here, the United States subsidiary of a Japanese parent did not assert that the FCN Treaty gave it blanket immunity from *all* types of discrimination and at all levels of the organization. Rather, the position of the employer (Quasar), like that of Uniden America, was that:

> The treaty permits discrimination on the basis of citizenship, not of national origin; Title VII forbids discrimination on the basis of national origin, not of citizenship.[9] The treaty is a reminder that the two forms of discrimination—citizenship and national origin—must not run together, since one is permitted by treaty and the other forbidden by statute.

*Fortino*, 940 F.2d at 391-92.[10]

As in the instant case, in *Fortino* the Japanese parent sent a relatively small number of expatriates to the United States in order to oversee its investments. Moreover, the Japanese parent caused all of the conduct which was alleged to be discriminatory. This included the assignment of Japanese expatriates to other subsidiaries, or back to Japan, instead of discharging them as the United States subsidiary had done with respect to the plaintiffs. *Id.* at 392. The *Fortino* court stated:

> This was favoritism all right, but discrimination in favor of foreign executives given a special status by virtue of a treaty and its implementing regulations is not equivalent to discrimination on the basis of national origin [or race].

*Id.* The court went on to find:

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[9] *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 S.Ct. 334 (1973).

[10] Before the Fifth Circuit, Papaila argued that because of "the homogenous nature of Japanese society," favored treatment of Japanese citizens results in "preferential treatment for individuals of Japanese national origin, effectively giving rise to discrimination on the basis of national origin and race." Papaila's Brief at 19-20. Here, however, Papaila only includes a statement of fact that the overwhelming majority of the population of Japan are of Japanese ethnicity. Petition at 6. However, Papaila never makes *any argument* regarding this homogeneity. Therefore, as such argument has not been briefed by Papaila, it has been waived. *Castaneda v. Partida*, 403 U.S. 482, 486 n.4, 97 S.Ct. 1272, 1276 n.4 (1977); Sup. Ct. R. 14.1(a). Regardless, Uniden America previously has demonstrated that the distinction is of no consequence. *See* Uniden's Brief at 13 n.14.

> The exercise of a treaty right may not be made the basis for inferring a violation of Title VII. . . . That right would be empty if the subsidiary could be punished for treating its citizen executives differently from American executives. . . . [If this were the result] Title VII would be taking back from the Japanese with one hand what the Treaty had given them with the other.

*Id.* at 393.

The *Fortino* court noted that in *Sumitomo Shoji* "there was no contention that the parent had dictated the subsidiary's discriminatory conduct. . . ." [11] As to the open question of whether the subsidiary could assert the parent's treaty rights, *Fortino* found that it could, because otherwise the FCN Treaty would be:

> set at naught. A judgment that forbids Quasar to give preferential treatment to its expatriate executives that its parent sends would have the same effect on the parent as it would have if it ran directly against the parent. . . .

*Id.*

In *Fortino,* the Seventh Circuit was greatly influenced by the fact that, like the case with Uniden America, the subsidiary had employees of Japanese "race" and national origin who were *not* expatriates, and who thus were treated no more favorably than their U.S. subsidiary counterparts whose ancestry originated in other parts of

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[11] In his Petition, Papaila suggests (without supporting authority) that in the briefs and oral argument in *Sumitomo Shoji* the statement *was* made that the foreign parent controlled the expatriates sent to the United States subsidiary. Petition at 24. He then suggests that the contention implicitly was rejected by this Court. This is a specious argument. Merely mentioning a fact in a brief does not mean that the reviewing court *considered* all, or even any, possible ramifications of that fact. Clearly, this Court in *Sumitomo Shoji* did not believe that the issue of the subsidiary's right to invoke the parent's treaty privileges was before it—as the Court *expressly stated.* 457 U.S. at 181 n.19, 102 S.Ct. at 2382 n.19.

the world. These facts negated any inference that Quasar made distinctions upon Title VII's prohibited race or national origin grounds, as opposed to distinctions based on *citizenship* which clearly are permitted by the FCN Treaty. *Id.*

Like in *Fortino*, it is clear in the instant matter that the type of "discrimination" complained about by Papaila—involving as it does a handful of Japanese citizen expatriates sent by Uniden Japan to protect its shareholder interests—was *not* a violation of Title VII. The Fifth Circuit decision therefore was correct. *See also Starrett v. Iberia Airlines of Spain*, 756 F.Supp. 292 (S.D.Tex. 1989) ("of their choice" clause in treaty limited to discrimination in favor of nationals of the country of the parent).

b. *The District Courts' Rulings in* Spiess *and* Goyette *Do Not Mandate a Different Result*

Papaila cites only two District Court cases to support his contention that a U.S. subsidiary may not invoke the treaty rights of its parent. Each of these cases, however, is fundamentally distinguishable from the case at hand, and neither dictates a reversal of the Fifth Circuit.

The first case cited by Papaila is the unpublished District Court opinion reviewed by the court in *Spiess v. C. Itoh & Co., Inc.*, 725 F.2d 970 (5th Cir. 1984), *cert. denied*, 469 U.S. 829 (1984).[12] Papaila notes that the District Court ruled that it would not permit the American subsidiary of a Japanese corporation to assert the treaty rights of its parent because such a ruling would "accomplish indirectly what it cannot accomplish directly" under *Sumitomo Shoji*. *Id.* at 973. What Papaila fails to acknowledge is that, although the subsidiary argued that the personnel decisions in question had been man-

[12] The Fifth Circuit ruled that it did not have jurisdiction to review the District Court's decision. *Id.* at 971.

dated by the parent corporation, the District Court specifically found that "[t]he hiring questioned by plaintiffs in the instant case is that of Itoh-American [defendant]." *Id.* Thus, the District Court in *Spiess* found that the subsidiary was attempting to invoke the treaty rights of its parent with respect to its *own* personnel decisions. Here, however, there is *no* dispute that the challenged employment practices were dictated by the parent, Uniden Japan, *not* Uniden America.

The second decision cited by Papaila, *Goyette v. DCA Advertising*, 66 Fair Empl. Prac. Cas. (BNA) 1045 (S.D.N.Y. 1993) also is inapplicable. There, the District Court, relying on the Second Circuit's decision in *Sumitomo Shoji*,[13] held that the subsidiary could not assert the treaty rights of the parent because it had not shown that Japanese citizenship was a "bona fide occupational qualification." *Id.* at 1054. Here, Uniden America did not raise a BFOQ argument in its motion for summary judgment, and the issue therefore was not before either the District Court or the Fifth Circuit.[14]

### 2. *The Fifth Circuit's Decision Is Consistent With the Language of the Treaty*

Papaila makes a convoluted argument in his Petition that the "plain language of the Treaty does not indicate an intent to permit United States subsidiaries to invoke

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[13] Another question left open by the Supreme Court in *Sumitomo Shoji* was "whether Japanese citizenship may be a bona fide occupational qualification ['BFOQ'] for certain positions [with the subsidiary] or as to whether a business necessity defense may be available." 457 U.S. at 189 n.19, 102 S.Ct. 2382 n.19.

[14] Interestingly, Papaila ignores the guiding principle behind *Goyette* which is that "as applied to a Japanese company enjoying rights under Article VIII of the [FCN] Treaty, [this exception to Title VII] must be construed in a manner that will *give due weight to the Treaty rights. . . .*" *Id.* at 1054 (quoting *Sumitomo Shoji*, 638 F.2d at 559) (emphasis added). Thus, the court in *Goyette* expressly recognized that the FCN Treaty does create an exception to Title VII.

the Article VIII(1) rights of their parents." Petition at 11. This argument is flawed at its inception.

First, there is no case law to support Papaila's tortured reading of the Treaty. In fact, the only decision which addresses the argument raised by Papaila adopts the opposite view. The Second Circuit opinion in *Sumitomo Shoji*, often relied upon by Papaila in his Petition, *rejected* the notion that "dramatic distinctions" should be drawn between "nationals," "companies" and "enterprises":

> It is illogical to infer that the drafters of the Treaty intended to make such a dramatic distinction between forms of business operation or to act in such a haphazard way.

*Sumitomo Shoji*, 638 F.2d at 556.[15] Thus, Papaila's construction of the Treaty lacks any case authority. Petition at 12.

More significantly, even if Papaila's construction is correct (which it is not), for purposes of the instant case

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[15] The Second Circuit further explained the nonsensical results dictated by Papaila's interpretation of the Treaty:

> [I]f we were to accept [this] view . . . a crazy-quilt pattern would emerge. Under such a reading *Japanese branches* in the United States would be guaranteed "access to the courts of justice" (Article IV(1)), protected against "unlawful entry or molestation" (Article VI(2)), given the right to dispose of "property of all kinds" (Article IX(4)), allowed to obtain and maintain "patents of invention" (Article X), permitted to make "payments, remittances and transfers of funds or financial instruments" (Article XII(1)), and allowed to engage in "importation and exportation" (Article XIV(5)). *Japanese subsidiaries*, on the other hand, would not be guaranteed any of the rights conferred on Japanese branches operating in the United States, but would instead have to be content with national treatment in such areas as "the taking of privately owned enterprises into public ownership and . . . the placing of such enterprises under public control" (Article VI(4)).

*Id.* at 556. The Supreme Court did not address this statutory construction issue, and thus, under Papaila's own analysis, the Second Circuit opinion is persuasive authority.

it is an argument that leads nowhere. The end result of Papaila's analysis is that a subsidiary is not, *itself*, granted the protections of Article VIII of the FCN Treaty. But once again, *that issue is not before the Court!* Uniden America does not contend, and the Fifth Circuit did not hold, that as a subsidiary it is entitled to all of the rights enjoyed by its parent under Article VIII. What the Fifth Circuit held, consistent with the language of the Treaty, is that where a decision is made by an entity which *is* protected under Article VIII, then *that* decision carries the protection of the Treaty. Papaila simply refuses to discern the difference between conduct dictated by the parent and conduct initiated by the subsidiary. However, for the former, the Treaty attaches; for the latter, it does not.

### 3. *The Fifth Circuit's Decision Is Not in Conflict With Decisions of Other Courts*

In his Petition, Papaila incorrectly asserts that there is a conflict among the Circuits "as to the Rights of an American Based Corporation to assert the Treaty Rights of its Parent." Petition at 20. Specifically, Papaila contends that the Fifth and Seventh Circuits are in conflict with the Second Circuit on this issue, which was "Arguably Left Open" in the Supreme Court's *Sumitomo Shoji* decision. *Id.* Papaila's assertion is incorrect, and thus cannot serve as a basis for a writ of *certiorari*.

First, it is not even remotely "arguable" that the *Sumitomo Shoji* Court *did* in fact leave open the issue of whether a U.S. subsidiary may invoke the treaty rights of a parent. As explained *supra*, this Court clearly stated that it "express[ed] no view" on this issue. *Sumitomo Shoji*, 457 U.S. at 189 n.19, 102 S.Ct. at 2382 n.19.

Additionally, the Fifth, Seventh and Second Circuit Courts are in *accord* as to the extent of treaty protection. Indeed, the Second Circuit went even *further* and held:

> We are satisfied that the Treaty's provisions may be invoked by a wholly-owned Japanese subsidiary in-

> corporated in the United States to the same extent that they may be availed of by Japanese corporations or firms operating in the United States.

*Sumitomo Shoji*, 638 F.2d at 555-56.[16] It was this more expansive reading of the Treaty that was rejected by the Supreme Court. For Papaila to argue that the Second Circuit reads the scope of the Treaty more *narrowly* than does the Fifth Circuit is pure nonsense.

Thus, it is clear that all of these Circuit Courts have reached the *same* conclusion, *i.e.*, that the Treaty would be frustrated unless, in the circumstances of the case at bar, the U.S. subsidiary could assert the treaty rights of the parent. Clearly, there is no conflict to be addressed by a writ of *certiorari*.[17]

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[16] It is unclear why Papaila cites the portion of the Second Circuit's decision in *Sumitomo Shoji* concerning the "freedom-of-choice" clause of the Treaty and the BFOQ clause of Title VII. Petition at 20-21. That discussion is completely irrelevant to the issue regarding which Papaila asserts the Circuits are in conflict.

[17] It also is unclear whether Papaila is asserting that there is some other conflict, as Papaila does not state what the conflict is. Clearly there is no conflict as to the BFOQ issue, as neither the Fifth Circuit nor the Seventh Circuit, *in any way*, addresses the applicability or scope of a BFOQ analysis in their decisions. Thus, nothing in the Seventh Circuit's *Fortino* or the Fifth Circuit's *Papaila* decisions conflicts with the Second Circuit's holding in *Sumitomo Shoji* that a Japanese company may make a BFOQ showing that the Japanese nationals are necessary to the business in the United States. *Sumitomo Shoji*, 638 F.2d at 559. There also is no conflict with regard to the "freedom-of-choice" clause. In *Sumitomo Shoji*, the Second Circuit held that that clause did not support "Sumitomo's broad interpretation, which carried to its logical conclusion, would immunize a party not only from Title VII but also from laws prohibiting employment of children, § 12 of the Fair Labor Standards Act, . . . laws granting rights to unions . . . and the like." 638 F.2d at 552. Thus, what the Second Circuit held is that there is not a complete U.S. employment law exemption for Japanese firms operating under the Treaty. *Id.* at 558. If the Fifth and Seventh Circuits had rendered the opposite conclusion, *i.e.*, if they had found a complete exemption, there might

## IV. TITLE VII AND THE FCN TREATY MAY BE READ IN HARMONY BY EXCLUDING JAPANESE EXPATRIATES AS COMPARITORS UNDER TITLE VII

Papaila proposes a "harmonizing" interpretation of the FCN Treaty by which a Japanese corporation would enjoy the right to *place* expatriate employees with U.S. subsidiaries, but thereafter could not provide them any preferential treatment, including transfer back to Japan. Such an interpretation is fundamentally inconsistent with the balance of Papaila's arguments in his Petition and would frustrate the purposes of the Treaty.[18]

### A. Papaila Acknowledges That the Treaty Grants Immunity From Title VII Under Certain Circumstances

After arguing throughout his Petition that the FCN Treaty was not intended to, nor does it, provide any kind of immunity from Title VII, Papaila makes a turnabout and proposes that the Treaty be read to allow "for the *limited* right of preferential placement of Japanese in-

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arguably be a conflict. However, the Fifth and Seventh Circuits did *not* find such; rather, both courts limited the exception to situations where the parent dictates the complained-of conduct and only "to the extent necessary to prevent the treaty from being set at naught." *Papaila*, 51 F.3d at 55 (quoting *Fortino*, 950 F.2d at 393). Thus, these decisions are not in conflict.

[18] Papaila makes only a gesture towards preserving his argument, rejected below, that "where there is a conflict between the statute and the treaty, the last in time controls." Petition at 19. Because Papaila has not seriously briefed this issue, suffice it to say that Uniden America previously has explained that the widely recognized rule is that the last-in-time analysis is not to be applied *unless Congress clearly has stated its intention to repeal the former treaty. See Blanco v. United States*, 775 F.2d 53, 61 (2nd Cir. 1985) (citing *Posados v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352 (1936) ("[t]he intention of the legislation to repeal must be clear and manifest")); Uniden's Brief at 17-20. Here, Papaila can point to no such intent, manifest or otherwise, and therefore his last-in-time analysis collapses.

dividuals into delineated positions of management and positions requiring technical expertise." Petition at 19. This is significant, in light of the fact that there is, and could be, no dispute that preferential placement of persons of a particular race or national origin otherwise would constitute a *per se* violation of Title VII. Yet Papaila seems unconcerned with this inconsistency in his arguments.

### B. Papaila's "Harmonizing" of Title VII With the FCN Treaty Would Frustrate the Purpose of the Treaty

Papaila fails to explain how his reading of the statute and Treaty satisfies the purpose of the latter. As previously explained, the purpose of the Treaty is to provide a means by which Japanese corporations may "control" their investments in the United States. Papaila's reading, however, would eviscerate any control a Japanese parent might have over its U.S. subsidiaries. Were Papaila's interpretation to be adopted, it would mean that once Uniden Japan preferentially assigned an expatriate to Uniden America, that expatriate would come under the exclusive control of *Uniden America*. Uniden America then would be forced to treat the expatriates identically to all other employees in order not to run afoul of Title VII. The parent corporation could not make its own decisions regarding the pay, treatment, transfer, or recall of its expatriate employees. The result would be more akin to Uniden America "borrowing" expatriate employees than Uniden Japan assigning such expatriates to oversee its investments. Thus, Uniden Japan would be denied any real benefit from such an assignment, despite the provisions of the Treaty.

### C. Papaila's "Harmonizing" of Title VII and the FCN Treaty Is Unsupported by the Case Law

Unfortunately for Papaila, his reading of the FCN Treaty is unsupported by the relevant case law. The lower courts consistently have held that when the FCN

Treaty can be applied, the Title VII immunities with respect to expatriate employees go beyond mere placement. Thus, in a portion of the Fifth Circuit's *Spiess* decision which is still good law, the court held:

> considering the Treaty as a whole, the only reasonable interpretation is that article VIII(1) means *exactly what it says:* companies have a right to decide which executives and technicians will manage their investments in the host country, without regard to the host country's [employment] laws.
>
> * * *
>
> Thus, we hold that the article VIII(1) "of their choice" provision permits Japanese companies to discriminate in favor of their fellow citizens.

*Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353, 361-62 (5th Cir. 1981) (emphasis added).[19] This completely destroys Papaila's tortured and nonsensical attempt to hedge his bets, *i.e.*, to argue that if Uniden America *can* assert the FCN Treaty right of Uniden Japan to "place" the expatriate, its right to "violate" Title VII *stops* once the expatriate has been sent to the U.S. subsidiary.

Indeed, a recent Third Circuit Court of Appeals decision squarely rejected Papaila's argument. *MacNamara*

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[19] This was the initial decision entered by the Fifth Circuit in the *Spiess* case. Among several rulings in that case was one that a U.S. subsidiary of a foreign corporation could assert treaty rights on its own behalf. *Id.* at 363. That holding preceded this Court's decision in *Sumitomo Shoji*. For that reason, a short time after the *Spiess* opinion was rendered, it was appealed to the Supreme Court, vacated, and then remanded. 457 U.S. 1128 (1982). The Fifth Circuit never had to address the key issue in the case at bar, *i.e.*, whether and under what circumstances the U.S. subsidiary could assert the parent's treaty rights for decisions directed by the parent. However, there are *numerous* principles decided in *Spiess* that in other ways fully support the Fifth Circuit's subsequent decision in the instant case and remain good law, including those which are quoted in the text above.

*v. Korean Air Lines*, 863 F.2d 1135 (3rd Cir. 1988), *cert. denied*, 493 U.S. 944 (1989). There, as here, the plaintiff argued that a foreign corporation's right to "engage" executives of its choice did not "subsume or incorporate its decision to *terminate* him." *MacNamara*, 863 F.2d at 1141 (emphasis in original). In *MacNamara*, however, the Third Circuit agreed with the lower court's "reasoning that the concept of engagement necessarily included termination." *Id.*[20]

### D. The FCN Treaty and Title VII May Be Read in Harmony by Excluding as Comparitors Under Title VII Expatriates Who Are Under the Control of the Parent

As demonstrated above, the relevant case law squarely rejects Papaila's attempt at harmonizing the FCN Treaty with Title VII. However, that does not mean that these cases do not themselves harmonize the two apparently conflicting laws, as did the Fifth Circuit decision below. As explained by Uniden America to the court below, there are several means of reconciling Title VII with the Treaty. Uniden's Brief at 21-24. In the decision below, the Fifth Circuit chose to harmonize the Treaty and the statute essentially by removing as "comparitors" for Title VII purposes expatriate personnel whose terms and conditions of employment are set by the parent corporation. *Papaila*, 51 F.3d at 56.[21] Thus, a U.S. citizen employed

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[20] This further undercuts Papaila's imagined "conflict" among the Circuit Courts. Indeed, following this Court's decision in *Sumitomo Shoji*, every Circuit Court addressing the issue has held that the Title VII immunity under the FCN Treaties goes *beyond* mere placement. This was the conclusion of the Third (*MacNamara*), Fifth (*Papaila*), Sixth (*Wickes*), and Seventh (*Fortino*) Circuits. In the nearly fifteen years since it was reversed by the Supreme Court, the Second Circuit has not returned to this issue. Thus, there is unanimity among the Circuit Courts with respect to this point following the *Sumitomo Shoji* decision by this Court.

[21] The Fifth Circuit also noted with approval the citizenship versus national origin distinction urged by Uniden America, *i.e.*,

by the U.S. subsidiary of a Japanese corporation is assured of equal treatment as compared to all employees who are under the control of the subsidiary, including employees of Japanese "race" and national origin. That same employee may not, however, demand equal treatment with expatriate employees who are under the exclusive control of the parent corporation.

The conclusion reached by both the Fifth Circuit, as well as the Seventh Circuit in *Fortino*, neatly harmonizes the various strands of case law discussed herein. The purposes of the FCN Treaty are not frustrated by these decisions, as the parent corporation maintains its freedom to assign expatriate employees to its U.S. subsidiaries and to set the terms of their employment. At the same time, the U.S. subsidiary is fully bound by the laws of the United States, including Title VII, with respect to any decisions *it* makes with respect to *its* employees. Therefore, the decision of the Fifth Circuit below is proper and does not merit review by this Court.

**E. The Decision Below Reflects Good Public Policy**

Any attempt at harmonizing the FCN Treaty with Title VII should be consistent with the public policy concerns underlying the Treaty. Under Papaila's analysis: (1) Uniden Japan legally may assign an expatriate citizen "of its choice" to protect the assets invested in Uniden America, but then could not reassign or recall that expatriate to the home country if a non-expatriate with the same performance record would have been discharged under the same circumstances, and (2) Uniden Japan could not

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**that Title VII prohibits national origin discrimination, whereas the Treaty *allows* discrimination on the basis of *citizenship*. *Papaila*, 51 F.3d at 56 n.2. The courts in *Spiess*, *Fortino*, and *MacNamara* each based their decision, in part, upon such a distinction and found that since all of the allegedly favored individuals were *citizens* of the parent's home country, Title VII's principals remained intact.**

differentiate in favor of expatriates on the basis of inducements and other benefits. If this were the case, then the parent company's willingness to invest its assets in the United States could be diminished significantly. Likewise, if Papaila's illogical view were to prevail, foreign nations may respond by placing similar "tit-for-tat" restrictions upon expatriates of U.S. companies. It was precisely this kind of jingoistic "trade war" that the FCN Treaty was negotiated to prevent. *Sumitomo Shoji*, 457 U.S. at 184-89, 102 S.Ct. at 2379-81.

## CONCLUSION

An affirmance of the court below would mean only that Papaila could not use as "comparitors" the handful of Japanese expatriates sent by Uniden Japan to Uniden America to protect its assets. However, Papaila still *would* have the right to make such comparisons with every *other* Uniden America employee, *including* the six employees of Japanese "race" and national origin who are not expatriates. A reversal of the court below would set Article VIII(1) "at naught" and, Uniden America believes, could have serious repercussions upon international investments and trade. Therefore, Papaila's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD M. KOBDISH *
REBECCA A. SINGER
R. S. GHIO
FULBRIGHT & JAWORSKI L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
(214) 855-8000
*Counsel for Respondent*
* Counsel of Record